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No. 80-6680

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CHARLES RONALD McELROY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

1. Whether, in a prosecution under 18 U.S.C. 2314 for transporting in interstate commerce "with unlawful or fraudulent intent" certain "falsely made" or "forged" securities, the government must prove not only that the forgery occurred in the course of continuous interstate movement of the securities but that it occurred before they crossed state lines.

2. Whether the evidence was sufficient to support the jury's finding that petitioner transported the securities in question across state lines.

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OPINION BELOW

The opinion of the court of appeals en banc (Pet. App. 1a-1 through 1a-24) is reported at 644 F.2d 274.

JURISDICTION

The judgment of the court of appeals (Pet. App. 4a) was entered on March 17, 1981. The petition for a writ of certiorari was filed on May 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on two counts of transporting a forged check in interstate commerce, in violation of 18 U.S.C. 2314, and one count of transporting a stolen automobile in interstate commerce,

in violation of the Dyer Act, 18 U.S.C. 2312. He was sentenced to concurrent terms of seven years' imprisonment on the forged check counts and five years' imprisonment on the Dyer Act offense. The court of appeals reversed the Dyer Act conviction and otherwise affirmed (Pet. App. 1a-1 to 1a-24).

The government's evidence at trial established that in 1977 blank checks were stolen from a Youngstown, Ohio local of the Laborer's International Union of North America and drawn on the Dollar Savings & Trust Company, an Ohio bank (Tr. 138). In October 1978, petitioner appeared at the Don Allen Chevrolet showroom in Pittsburgh, Pennsylvania, where he spoke with salesman Albert Girardi. Petitioner told Girardi his name was "William Jones" and said that he resided in Warrenville Heights, Ohio (Tr. 46-47, 48). Petitioner asked Girardi to draw up an order for the purchase of a Corvette for $6,700 and said that he was going to return the next day with a credit union check to pay for the car (Tr. 49; Pet. App. 1a-3). Petitioner returned to the dealership as promised, tendered a check covering the purchase price, and drove away in the Corvette. The check was one of those stolen from the Union, and the signature was forged (Pet. App. 1a-3).[1/]

In December 1978, petitioner appeared at Rini Marine Sales in Beaver Falls, Pennsylvania and inquired about buying a boat. Once again he gave an Ohio address and said that he would have to obtain a check from his credit union (Tr. 76-77, 86-87). A week after his initial approach, petitioner called Rini Sales' proprietor to report that he was going to purchase a boat and trailer and planned to get the check from his credit union. Later that same day he called to ask the proprietor to wait at the store for him; he reported that he was calling from a rest

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1/ The dealership called the Youngstown bank the next day and discovered that the account had been closed. Accordingly, it made no attempt to negotiate the check (ibid.).

stop on the Ohio Turnpike (Tr. 77). He subsequently arrived at Rini Sales in a truck bearing Ohio license plates, which subsequently proved to be registered to another vehicle (Tr. 78, 83). He tendered a check already mechanically imprinted (Tr. 79-80). This check also had been stolen from the Union, and the signature had been forged. When Rini Sales learned that the union account had been closed, it did not attempt to collect on the check (Pet. App. 1a-3 to 1a-4).

Petitioner admitted to an FBI agent that he was living in East Liverpool, Ohio at the times of the Corvette and boat purchases.

Over petitioner's objection, the district court instructed the jury as follows (Tr. 164a-165a):

> Now, the Government must show that the checks were transported in interstate commerce in a forged condition. However, the transportation within the destination state here, Pennsylvania, may be considered transportation in interstate commerce if it is a continuation of the movement that began out of state.
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> * * * *
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> Now, if you believe that the Government has shown that the Defendant transported the checks while they were in a forged condition within the State of Pennsylvania, the requirements of the law are satisfied if that transportation was part of interstate commerce. In other words, the check had to originate at sometime in Ohio and had to have been transported at sometime in Pennsylvania in order to effect interstate commerce. So the Government must prove this Defendant transported the checks involved in Counts 1 and 3 of the indictment in interstate commerce between Ohio and Pennsylvania, but need not prove the place in Ohio from which the checks started or from where the Defendant started.2/

2/ The court also gave a seemingly inconsistent instruction, however. It had previously charged (Tr. 162a-163a; emphasis added): "[T]his Defendant had to know at the time that when he brought that check across the state line that it was false, it was a false check, it was a counterfeited, forged check * * *."

2. The court of appeals heard the case en banc and affirmed petitioner's convictions under Section 2314.[3/] The majority opinion, joined by six of the ten judges, held that the government was not required to prove that the checks were forged before they crossed state lines. The majority expressly declined to follow the contrary view expressed by three circuits. See United States v. Sparrow, 635 F.2d 794 (10th Cir. 1980); United States v. Hilyer, 543 F.2d 41 (8th Cir. 1976); United States v. Owens, 460 F.2d 467 (5th Cir. 1972). It noted (Pet. App. 1a-7, footnote omitted) that the language of the statute "does not state that the checks must be forged before interstate transportation begins. Transportation in interstate commerce has a broader meaning." The majority reasoned (Pet. App. 1a-7, 1a-8):

> A person who travels from one state to another for the purpose of purchasing an article in the destination state is moving in interstate commerce, and the character of such a trip does not cease upon entering the destination state. It continues until the purpose of the journey has been achieved -- indeed, more likely until a return has been made to the point of origin. Understandably, therefore, the courts have found interstate movement both before and after a state line has been crossed.
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> * * * *
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> In this case, therefore, a trip by the defendant from Ohio to Pennsylvania to transact business would put him in interstate commerce. The nature of this movement did not change the instant he crossed the border into Pennsylvania. At the very least, it continued until he completed his business transactions in the destination state. At some time during this travel, the defendant transported the checks in a forged condition and later delivered them to the car and boat dealers. It is immaterial whether the signatures were forged in Ohio or in Pennsylvania. If at any point in the interstate movement the check was in a forged condition, the statute was satisfied.

3/ The majority reversed the Dyer Act conviction for insufficient evidence.

Three of the four judges who did not join the majority opinion nonetheless expressly agreed with the majority's analysis of the meaning of "interstate commerce" as used in Section 2314. Judges Adams and Seitz dissented only from that part of the majority opinion that reversed petitioner's Dyer Act conviction (Pet. App. 1a-12 to 1a-15). Judge Garth agreed with the reversal of that conviction (id. at 1a-15). He also agreed with the conclusion of the majority that it need not be shown that the checks had been forged at the time they were transported across state lines in order to establish the interstate commerce element of Section 2314 (id. at 1a-15 to 1a-16). He would, however, have reversed petitioner's Section 2314 convictions because he believed that there was insufficient evidence for a jury finding that petitioner had transported the checks--in either their blank or their forged condition--across state lines and because he believed that the jury charge did not clearly require a finding that it was petitioner who transported the checks across the state line (Pet. App. 1a-16 to 1a-20).4/ Judge Higgenbotham alone expressed the view that petitioner could not be convicted under the charged language of Section 2314 unless the checks were forged at the time they crossed state lines (Pet. App. 1a-21 to 1a-24).5/

DISCUSSION

1. Petitioner correctly states (Pet. 11-12) that the decision of the en banc court of appeals in this case conflicts with decisions of three other circuits on the question whether,

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4/ The majority specifically considered the sufficiency of the evidence point and concluded (Pet. App. 1a-10) that "[t]he jury was free to find that on each occasion the defendant made a trip from Ohio to Pennsylvania, carrying with him a check that was forged either in Ohio or Pennsylvania, but in any event before the interstate travel terminated."

5/ Judge Higginbotham, however, would have permitted the government to retry petitioner on the Section 2314 counts, under revised jury instructions.

in a prosecution under the third paragraph of 18 U.S.C. 2314 for transporting in interstate commerce, "with unlawful or fraudulent intent," any "falsely made" or "forged" securities, the government must prove that the forgery or falsification of the securities occurred before they were transported across state lines. United States v. Sparrow, 635 F.2d 794 (10th Cir. 1980) (en banc); United States v. Hilyer, 543 F.2d 41 (8th Cir. 1976); United States v. Owens, 460 F.2d 467 (5th Cir. 1972). We believe that, for the reasons stated in its opinion, the court below correctly held (Pet. App. 1a-2) that to obtain a valid conviction under this provision of Section 2314, the government need not prove that securities were forged before they crossed state lines, at least so long as it is proven that the forgery occurred at some time during a continuous interstate transportation of those securities.

We also agree with petitioner that the question warrants resolution by this Court. The conflict is clear and the question is of sufficient importance to meet the standards for grant of certiorari. In few, if any, cases is the government able to prove precisely when a forgery of checks or other securities occurs. Unlike travel by individuals on interstate routes or the presentation of forged securities, the actual forgery is likely to be an unwitnessed event occurring in a private place. Although prosecutions are possible where a forged check has actually been negotiated through interstate commerce by the party to whom it has been presented, this case demonstrates that victims are not likely to negotiate checks when they have ascertained by telephone inquiries that the checks are worthless.

The law in the three circuits that construe the third paragraph of Section 2314 as petitioner urges will be controlling precedent in 19 States. Until the question is resolved by this Court, the government will therefore be unable, in more than a third of the States, to prosecute certain offenses involving

forged securities that, if we are correct in our submission, Congress intended to bring within federal jurisdiction.

2. The second question presented by petitioner--whether the evidence was sufficient to show the petitioner himself transported the securities across state lines--has no significance beyond this case and hence is not appropriate for review by this Court. In any event the conclusion of the court of appeals on the sufficiency question was correct and does not call for any exercise of supervisory power by this Court as petitioner suggests (Pet. 13).

Only Judge Garth found the evidence insufficient;[6] and the evidence noted by the majority (Pet. App. 1a-10)--including testimony (1) that petitioner lived in Ohio, where the checks had been stolen, during the period in which he passed them in Pennsylvania, (2) that he had proposed to have the car obtained from Don Allen Chevrolet titled in Ohio, and (3) that he arrived at Rini Marine Sales in a truck bearing Ohio license plates after calling to report that he had stopped briefly at a rest stop on the Ohio Turnpike--was plainly an adequate basis for a conclusion by the jury that petitioner had transported the checks across state lines.[7]

6/ We note that petitioner does not challenge the jury instructions on the ground relied on by Judge Garth, i.e., that the instructions erroneously failed to require the jury to find that petitioner transported the checks across state lines in either their original or their forged condition. In any event, we submit that, read as a whole, the instructions required the jury to find that petitioner crossed state lines with the checks, although he may have transported them in their forged condition only in the State of Pennsylvania (see page 4, supra). Accordingly, the instructions afford no ground for reversal of petitioner's conviction if the majority was correct in its reading of Section 2314. See United States v. Park, 421 U.S. 658, 674 (1975).

7/ We of course do not suggest that an actual crossing of state lines by the individual charged under Section 2314 need always be shown. It is enough that a defendant causes the transportation of forged securities across state lines. See United States v. Pereira, 347 U.S. 1 (1954).

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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